Supreme Court, U.S.
FILED
JUL 25 2007
OFFICE OF THE CLERK

No. 07-96

In the Supreme Court of the United States

CONCERNED COMMUNITY INVOLVED DEVELOPMENT, INC.,

Petitioner,

v.

CITY OF HOUSTON, TEXAS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

DAVID MELASKY
COUNSEL OF RECORD
2777 ALLEN PARKWAY, SUITE 1000
HOUSTON, TEXAS 77019
713-965-9984-TELEPHONE
713-526-2708-FACSIMILE

COUNSEL FOR PETITIONER

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

The case involves the refusal of the City of Houston to allow adjacent and other affected property owners any form of participation in the permitting of a roadway bridge and its approaches which will impact their property. The disputed permit was sought by Candlelight Development Joint Venture, a private developer. Candlelight Development Joint Venture submitted engineering plans for the bridge and its approaches to the City of Houston. Homeowners living adjacent to the proposed bridge and its approaches were not allowed to see the proposed design prior to the City issuing the permit to the developer which authorized the developer to begin construction. Homeowners living adjacent to this bridge and the attendant street modifications assigned their causes of action to seek redress for the violation of their rights caused by the failure of the City to afford any form of procedural due process to Petitioner, a Texas non-profit corporation whose purpose is neighborhood preservation. Petitioner filed this action seeking injunctive relief and declaratory judgment in the state District Court of Harris County, Texas asserting violations of the U.S. Constitution's Fourteenth Amendment right to procedural due process pursuant to 42 U.S.C. § 1983 and violations of the Texas constitution and open government statutes. Petitioner sought and received a hearing on a Temporary Injunction to prevent any activity from being undertaken pursuant to the unconstitutionally issued permit. After the injunction hearing, the court dismissed all causes of action against the City of Houston by granting a Plea to Jurisdiction filed by the City of Houston. On appeal, the Texas Court of Appeals for the Fourteenth District affirmed the dismissal of the Fourteenth Amendment procedural due process claims by holding that unless a claim for a compensable taking is asserted, a property owner has no standing to bring a claim for procedural due process. Petitioner filed a Petition for

Review with the Texas Supreme Court. The Texas Supreme Court refused discretionary review on April 27, 2007. By holding that an infringement of property rights must be of sufficient severity to constitute a taking in order for a property owner to have standing to assert rights to procedural due process, the Texas courts are in conflict with the decisions of this court and the federal courts of appeals which have specifically recognized that the threshold for a property interest which is entitled to the protections of procedural due process is substantially less than the impact on property which an owner must demonstrate to establish a compensable taking. Accordingly, the questions presented by this petition are:

1. Does a city violate the procedural due processprotections of the Fourteenth Amendment of the U.S. Constitution when it grants a permit after denying affected property owners any opportunity to see the pending permit application or to participate *in any way* in the permitting process.

2. Can Texas Courts limit standing for a procedural due process challenge to a governmental decision affecting real property to only those cases in which a property owner can prove that the impact of the governmental action is severe enough to constitute a compensable taking thereby effectively eliminating the procedural due process protections of the Fourteenth Amendment except in situations when a substantive due process violation can also be asserted.

RULE 29.6 STATEMENT

Petitioner, Concerned Community Involved Development, Inc., is a Texas non-profit corporation.

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By holding that a property owner affected by a governmental action has no standing to claim a right to Fourteenth Amendment procedural due process unless the governmental action constitutes a compensable taking, the ruling of the Texas Court of Appeals conflicts with numerous decisions of this Court and the Sixth and Tenth United States Courts of Appeal which hold that procedural due process must be afforded to a much broader array of property rights than the narrow scope of governmental actions which effectuate a taking under both

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Concerned Community Involved Development, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals of Texas. Petitioner appealed this decision to the Texas Supreme Court which refused discretionary review on April 27, 2007.

OPINION BELOW

The decision of the Texas Court of Appeals (App. 2, *infra*) is reported at 209 S.W.3d 666. In refusing the application for discretionary review, the Supreme Court of Texas issued no opinion (See App. 1).

STATEMENT OF JURISDICTION

The order of the Texas Supreme Court denying discretionary review was entered on April 27, 2007 (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

STATEMENT

This case involves the granting of a permit (Pl. Exh. 2) by the City of Houston which authorized Candlelight Development Joint Venture through its contractor Lazer Construction Company, Inc. to build a bridge based on a design proposed by Candlelight Development Joint Venture on a City of Houston street known as Rosslyn Road extending this street over a flood control ditch and into a subdivision owned and to be developed by Candlelight Development Joint Venture. (RR 89-90) Petitioner is a non-profit organization created to protect neighborhood standards and quality which (Pl. Exh 10) has been assigned the causes of actions by various homeowners

living in the vicinity of the proposed bridge to prevent adverse impact to their property due to the likely effect of the bridge on their property. (Pl. Exh. 11) Petitioner filed suit in the 281st District Court of Harris County, Texas based on the failure of the City of Houston to allow affected citizens to participate in the permitting process or to even see the proposed plans for the bridge prior to permit issuance. (CR 2) Petitioner based its cause of action under 42 U.S.C. Section 1983 on the denial of Procedural Due Process guaranteed by the Fourteenth Amendment of the United States Constitution. Petitioner also sought relief under the Due Course of Law provision of the Texas Constitution (Article I, Section 19) and redress for violations of Texas Public Information and Open Meeting Acts based on the failure of the City of Houston to allow affected citizens to participate in the permitting process for the bridge design. Petitioner sought a declaratory judgment holding the permit to be void due to the constitutional infirmities in the process by which it was granted and temporary and permanent injunctions enjoining Respondents from proceeding with construction under the challenged permit.

The City of Houston (City) has a permitting ordinance by which private entities receive City permits authorizing the design and construction of a road or bridge within the right of way of a city street. Article II, Chapter 40 of the City of Houston Ordinances. (Pl.Exh.1[Attached as Appendix 4.]) An entity seeking such a permit submits a proposed design to the Director of Public Works for approval (Pl.Exh1.[App.4]Section 40-56) (The City Engineer has been designated by the Director of Public Works as having final approval authority for such permit) (RR 10,19) The evidence at the Temporary Injunction hearing established that it was the practice of the City of Houston in this case and in all permitting under this ordinance not to allow affected members of the public any form of

participation in the permitting process. (RR 56) Moreover, members of the public are not even allowed to see the proposed design until a permit has been issued. (Pl.Exh.4)[Attached as Appendix 3]. The evidence adduced at the Temporary Injunction hearing established the exclusion of the public from the permitting process which is conducted without any public disclosures, hearings, or notice. (RR 48-9) The City of Houston's position is effectively set forth on Plaintiffs Exhibit 4 [Appendix 5] which is a series of emails between Jack McReynolds, a property owner whose home will be directly adjacent to proposed bridge and the approaches thereto, and the City Engineer, Jack Sakolosky (the individual who has final permit approval authority) and Paul Nelson, a deputy Director of Public Works, the City department which employs the City Engineer. This series of emails can be effectively described as a refusal by the City of Houston to allow the property owners in the vicinity of the proposed bridge to even look at the plans until the City Engineer has approved these plans. Significantly the February 17-18, 2005 request to see the proposed bridge plans which is contained in P1.Exhibit 4 [Appendix 5] preceded March 31, 2005 approval of the bridge plans by City Engineer Jack Sakolosky. Testimony at the hearing established that the approval of the City Engineer is final approval prior to permit issuances (RR 20,40) and that even City Council can not reverse the decision of the City Engineer to grant a permit under Article II Chapter 40 (RR 42) of the city ordinance. Mr. Jack Sakolosky, the City Engineer, testified that although citizens requested an opportunity to see the bridge plans, this was not allowed until after the plans had been finally approved. (RR 49,55-6) The City Council member for the district which includes the proposed bridge location, the Honorable Toni Lawrence, testified that she was not allowed to see the bridge plans prior to approval by the City Engineer and that there had been no citizen input or hearing prior to approval of the bridge

plans by the City Engineer[1]. (RR 25-6,32) Mr. David Eng and Mr. Jack McReynolds, two citizens whose homes are impacted by the bridge and its approach also testified that their attempts to participate in the permitting process or even see the proposed plans were refused by the City (RR 134,136,160)[2].

The evidence at the Temporary Injunction hearing established that property in the vicinity of the proposed bridge would be affected by the design of the bridge and its approaches. A professional engineer, Mr. David Borengasser who had experience in engineering related to real estate development testified that the proposed approach to the bridge, which was approved by the City Engineer, would depress nearby property values. (RR 97,107-8,112) Mr. Eng testified that the proposed bridge design approved by the City would not only impact his property value but would interfere with the use and enjoyment of his home. (RR165-7) Mr. McReynolds stated that access to his home would be impaired by the proposed

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[1] Once the City Engineer approves the plans, a permit is issued without any further approvals upon the bond being posted and payment of the permit fee. (RR 49-50) The permit which is applied for by a developer may be issued to the contractor selected by the developer. In the case at bar the developer who applied for the permit is Candlelight Development Joint Venture. The permit application was filed by Candlelight Development Joint Venture and the permit issued to Candlelight Development Joint Venture's contractor, Lazer Construction Co.

[2] The proposed bridge is in the 4400 block of Rosslyn (RR 24) in Houston, Texas. Mr. Eng lives at 4423 Rosslyn and Mr. McReynolds lives at 4414 Rosslyn. Other homeowners who had assigned their rights to appellant to bring an action to prevent impact of the bridge on their homes include: Sybol Joe, 4410 Rosslyn, Michael and Jeanette Kaminski 4406 Rosslyn, Barbara Green 4431 Rosslyn, Tim Sawyer 4402 Deer Lodge, Hugh LeVrier 4403 Deer Lodge, H.R. Bush 1719 Bethlehem, Gerald Dickey 1851 Bethlehem, Earl Bordelon 1720 Bethlehem and Donna Patronella.

design and that his property value had been reduced. (RR 157, 138) In addition, the professional engineer Mr. Borengasser, reviewed the proposed design and found it to be a safety risk as well as a violation of the City design standards because the distance allowed in the design to narrow the road from a four lane esplanade divided street to a two lane bridge was unsafe and much less than the distance required by the published City Standards. (RR 101-2, 107)

The City of Houston filed a Plea to the Jurisdiction alleging the District Court had no jurisdiction to hear the issues of the U.S. Constitution's Fourteenth Amendment Procedural Due Process, the Texas constitution's guarantee of due course of law (Article I, Section 19) and compliance with the Texas Open Meetings and Public Information Acts. After an evidentiary hearing on the motion for a Temporary Injunction, the District Court denied the Temporary Injunction and granted the Plea to the Jurisdiction dismissing all causes of action against the City of Houston. The Order of the District Court is attached as Appendix 3.

The Court of Appeals reversed the plea to the jurisdiction as it related to the Texas Open Meetings Act and the Texas Public Information Act claims holding that the trial had subject matter jurisdiction over these issues and dismissal for lack of jurisdiction was improper. Petitioner does not challenge this portion of the Court of Appeals decision.

The Court of Appeals affirmed the remainder of the plea to the jurisdiction holding *sua sponte* that Petitioner had no standing to sue because the property rights for which petitioner sought procedural due process protection did not rise to the level of a compensable taking. Specifically the Court of Appeals stated:

> We are unaware of any cognizable property interest that might be impacted by the City other than an unconstitutional taking of property prohibited by article I, section 17 of the Texas Constitution. CCID has consistently denied that its claim is a takings claim. Therefore, CCID has failed to show any particular injury on which to sue. After fully reviewing the record, and after construing the petition in favor of CCID, we find CCID lacks standing to sue. (opinion of court of appeal, pg.7)

Thus the Court of Appeals held that no property owner is entitled to procedural due process in a governmental approval process which impacts an owner's property unless the impact constitutes a taking. This holding conflicts with the holdings of this Court and the Sixth and Tenth U.S. Circuit Courts of Appeals.

REASONS FOR GRANTING THE PETITION

By holding that a property owner affected by a governmental action has no standing to claim a right to Fourteenth Amendment procedural due process unless the governmental action constitutes a compensable taking, the ruling of the Texas Court of Appeals conflicts with numerous decisions of this Court and the Sixth and Tenth United States Courts of Appeal which hold that procedural due process must be afforded to a much broader array of property rights than the narrow scope of governmental actions which effectuate a taking under both the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 17 of the Texas Constitution.

By holding that a taking under Article I, Section 17 of The Texas Constitution is the threshold for procedural due process protections[3], the Court of Appeals decision ignores the numerous decisions of Federal courts which specifically hold to the contrary. The Tenth Circuit Court of Appeals rejected the argument that a taking is a necessary requisite to the assertion of procedural due process rights in *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 723 (10th Cir., 1988) in which the court stated:

> There are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required under the Fifth and Fourteenth Amendments. See, e.g., Cleveland Bd. of Educ. v. Loudermill,470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (property interest in continued public employment where discharge for cause only); Atkins v. Parker, 472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) (property interest in continued receipt of food stamps); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (property interest in adjudicatory process of Illinois fair employment practices statute); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (property interest in continued receipt of social

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[3]The standard for establishing a taking under Article I, Section 17 of the Texas Constitution is virtually identical to the standard for a taking pursuant to the Fifth Amendment of the U.S. Constitution and Texas Courts use federal precedent in determining takings issues under Tex. Const. Art. 1 § 17. *City of Austin v. Travis County Landfill Co.*, 73 S.W. 3d 234 (Texas, 2002).

> security benefits); Harris v. Blake, 798 F.2d 419 (10th Cir. 1986) (property interest in continued enrollment in public university after payment of tuition), cert. denied, 479 U.S. 1033, 107 S. Ct. 882, 93 L. Ed. 2d 836 (1987); Keney v. Derbyshire, 718 F.2d 352 (10th Cir. 1983) (property interest in license to practice medicine).

The *Landmark Land v Buchanan* case was followed by the Sixth Circuit in *Nasierowski Brothers Investment Co. v City of Sterling Heights*, 949 F.2d 890 (6th Cir., 1991). In addressing the rights of a property owner who alleged the lack of procedural due process in a zoning reclassification for a strip of land which included his property, the Sixth Circuit quoted the *Landmark Land* case holding that "As the Buchanan court noted, 'There are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required under the Fifth and Fourteenth Amendments.' Id., at 723 (citing cases).'' Id. at 894.

In numerous other holdings, this Court and federal appellate courts have recognized the substantially lower standard of property interests which are entitled to procedural due process versus the impact on property required to establish a taking pursuant to substantive due process of the Fifth and Fourteenth Amendment. In the seminal case of *Board of Regents v. Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), this Court recognized that a public employee with contractual tenure has a sufficient interest in continued employment to be within the safe guards of procedural due process. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), this court ruled that "[T]he types of interests protected as 'property' are varied

and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'"

Among the other numerous examples of rights protected by procedural due process is *Price v. City of Junction*, 711 F. 2d 582 (5th Cir, 1983) in which the Fifth Circuit held that junk cars are a property within the due process clause. ("Whether a junk car has little or great value, it is a constitutionally protected property.") In *Gikas v. Washington School District*, 328 F.3d 731 (3rd Cir., 2003), the Third Circuit held that a veteran had a property right to a veteran's employment preference for purposes of procedural due process.

As the foregoing authorities demonstrate, the procedural due process clause of the Fourteenth Amendment covers a much broader range of property rights than do the substantive due process clauses of the Fourteenth and Fifth Amendments. See *Bell v. Ohio State,* 351 F.3d 240 (6th Cir, 2003), *Independent Enterprises, Inc. v. Pittsburgh Water and Sewer,* 103 F.3d 1165 (3rd Cir, 1997). A right subject to procedural due process can be created or withdrawn by state law whereas substantive due process rights are fundamental and stem from the constitution. *Reich v Beharry*, 883 F. 2d 239 (3rd Cir., 1989).

As previously noted, the right to compensation for a taking which is protected by Article 1, Section 17 of the Texas Constitution is also a taking under the Fifth Amendment of the U.S. Constitution. See *Sheffield Development Co., Inc. v. City of Glenn Heights* 140 S.W.3d 660 (Tex. 2004) (wherein the Texas Supreme Court refers to the guarantees of the Fifth Amendment and Article 1, Section 17 as "comparable" and federal jurisprudence is used to analyze a takings claim.) Thus a taking under Article 1, Section 17 is the equivalent of Fifth and Fourteenth Amendment substantive due process.

The property interests cited by homeowners in this cause in support of their procedural due process rights - diminished property values, impacted ingress and egress to the affected properties, and an unsafe bridge approach in front of their properties[4] - are property interests that are well within the range of rights which have been interpreted as deserving of procedural due process protections by this Court and the Federal Courts of Appeals[5]. The decision of the Texas courts - to equate the threshold of property rights protected by the Fourteenth Amendment procedural due process with the threshold of a taking which requires compensation under the substantive due process guarantees of the Fifth and Fourteenth Amendments of the U.S. Constitution - effectively erases procedural due process protections for the vast majority of governmental actions which do not effectuate a physical taking of real property or so completely render real property sufficiently unusable as to constitute a taking for purposes of substantive due process.

The decision of the Texas Court of Appeals in this cause ignores the basic safeguard offered by the Fourteenth Amendment procedural due process. In the case of *Hamdi v. Rumsfeld*, 124 S.Ct.2633, 542 U.S. 507, 159L.Ed.2d 578 (U.S. 2004) this court addressed the issue of procedural due process claims in the context of the right of the federal government to protect national security and to take effective actions to counter terrorist threats. Even in the context of this essential and

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[4] As the Texas court of appeals noted, evidence on all these matters was introduced at the temporary injunction hearing.

5 As this court noted in *Phillips v. Washington Legal Foundation*, 118.S.Ct.1925, 141L.Ed.2d 174 (U.S. 1998) even the *right to control* interest payments is a recognizable and valuable property right which may not be infringed in an unconstitutional manner.

compelling governmental interest, the Court upheld the right to procedural due process as follows:

> Nor is the weight on this side of the Mathews scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," Jones v. United States, 463 U. S. 354, 361 (1983) (emphasis added; internal quotation marks omitted), and at this stage in the Mathews calculus, we consider the interest of the erroneously detained individual. Carey v. Piphus, 435 U. S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also id., at 266 (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is `absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions").

While the case at bar involves the property interests of homeowners vis-a-vis the liberty interests of the petitioner in Handi, nonetheless the right to procedural due process before any governmental action which impacts "life, liberty or property" rights, a right recognized once again in *Hamdi* even in the face of a of compelling governmental interest, precludes any assertion by the City of Houston of a purported governmental interest which would justify the complete denial of the rights of procedural due process as was vested upon the property owners affected by the granting of the disputed permit in this cause. Moreover, the decision of the Texas Court of Appeals in this cause to limit standing to owners of property

who have suffered a compensable taking effectively eliminates procedural due process in most property right cases in which property is impacted but not taken by the issuance of a permit. As this Court noted in *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank and United States*, 119 S.Ct. 2199, 144 L.Ed.2d 575 (U.S. 1999):

> The Due Process Clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, §1 (emphasis added). This Court has accordingly held that "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Zinermon v. Burch, 494 U. S. 113, 125 (1990) (emphasis deleted).

Accordingly, Petitioner would respectfully move this court to reverse the portion of the decision of the Court of Appeals which holds that Petitioner has no standing to bring its procedural due process claim and to grant the injunctive relief sought by Petitioner.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner moves this Court to grant this petition for Writ of Certiorari, and, upon hearing the merits of this cause, to find that Petitioner has standing to bring its procedural due process claims, to find that the denial by the trial court of the Temporary Injunction sought by Petitioner was error, to grant

the injunctive relief sought by Petitioner and for such other relief to which Petitioner is entitled.

Respectfully submitted,

DAVID MELASKY
COUNSEL OF RECORD
2777 ALLEN PARKWAY, SUITE 1000
HOUSTON, TEXAS 77019
TEL: (713) 965-9984
Fax: (713) 526-2708

APPENDIX

April 27, 2007 Notice from Texas Supreme Court Denying Petition for Review A-2

September 26, 2006 Opinion of the Court of Appeals A-3

Order on Plaintiff's Claim for Injunctive Relief and Defendant's Plea to the Jurisdiction Dated November 29, 2005 ..... A-14

Plaintiff's Exhibit 1 – Article II, Chapter 40, City of Houston Code of Ordinances A-15

Plaintiff's Exhibit 4 – Emails between City and Mr. McReynolds A-42

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248
[TEXAS STATE SEAL]

DATE: 4/27/2007
[POSTAGE METER IMPRINT]

RE:	Case No. 07-0090
COA #:	14-05-01254-CV
TC #:	2005-66589
STYLE:	CONCERNED COMMUNITY INVOLVED DEVELOPMENT, INC. v. CITY OF HOUSTON, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO: MR. DAVID H. MELASKY
539 HEIGHTS BOULEVARD
HOUSTON TX 77007

Affirmed in Part and Reversed and Remanded in Part and Opinion filed September 26, 2006.

[TEXAS STATE SEAL]

In The

Fourteenth Court of Appeals

NO. 14-05-01254-CV

CONCERNED COMMUNITY INVOLVED DEVELOPMENT, INC., Appellant

V.

CITY OF HOUSTON, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, L.L.C., and LAZER CONSTRUCTION COMPANY, INC., Appellees

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 05-66589

OPINION

Concerned Community Involved Development, Inc. ("CCID") sought a temporary and permanent injunction against the City of Houston ("the City"), Candlelight Development Joint Venture, and various other real estate development and construction entities (referred to collectively as "Candlelight") to prevent the construction of a bridge. The City filed a plea to the jurisdiction. The trial court conducted separate hearings on (1) CCID's request for injunctive relief and (2) the City's plea to the jurisdiction. In a single order, the trial court denied CCID's request for

injunctive relief and granted the City's plea to the jurisdiction. In two points of error, CCID contends the trial court erred in (1) overruling its due process claims by denying injunctive relief and (2) granting the City's plea to the jurisdiction. We affirm, in part, and reverse and remand, in part.

BACKGROUND FACTS

Candlelight Estates is a residential subdivision in Houston's northwest quadrant. The northern boundary of sections 1 and 2 of the subdivision is marked by a Harris County Flood Control District (the "District") drainage ditch. Rosslyn Road runs through northwest Houston in a generally north-south direction, but for want of a bridge, there is no through traffic across the drainage ditch. Accordingly, the road dead ends on both sides of the ditch.

Candlelight sought to facilitate the development of its property north of the ditch by constructing a bridge across the drainage ditch on Rosslyn Road. Candlelight sought approval from the District, and, in 2001, the District approved Candlelight's request to construct a bridge across the ditch. *City of Houston v. Grudziecke*, No. 14-02-00947-CV, 2003 WL 1922671, at *1 (Tex. App.–Houston [14th Dist.] Apr. 24, 2003, no pet.) (mem. op.). However, the proposed construction provoked opposition from citizens living in sections 1 and 2 of Candlelight Estates. Nevertheless, the City of Houston issued a permit for construction of the bridge. *Id.* Homeowners in the area sought an injunction in the 157th District Court against the City, Candlelight, and others to prohibit the construction of the bridge, contending that such construction constituted trespass and nuisance, violated section 11.086 of the Texas Water Code, and was an unconstitutional taking of their property. *Id.*

The City filed a plea to the jurisdiction contending the district court lacked subject matter jurisdiction because the homeowners did not suffer a taking under the Texas Constitution and, thus, suffered no injury. *Id.* at *4. We held the trial court had no subject matter jurisdiction because claims of inverse condemnation must be filed in the county court. *Id.* at *5. For reasons that are not entirely clear in our record, Candlelight subsequently abandoned its plan to build the bridge as designed. The original plan called for the bridge to be built on box culverts. Thereafter, Candlelight sought to build a "span" bridge across ditch, apparently necessitating an application for a new permit.

In March 2004, Candlelight submitted to the City its plans to construct paving and drainage facilities in conjunction with the installation of the Rossyln Road bridge. On October 11, 2005, the City's Department of Public Works and Engineering once again approved a permit authorizing Candlelight to construct a bridge across the ditch. Shortly thereafter, CCID, a non-profit corporation organized to protect the homes and properties of landowners in the vicinity of the proposed bridge, filed an application for injunctive relief in the 281st District Court. CCID alleged the permit issued by the City is void because it was based on "secret proceedings" that violated CCID members' rights to (1) federal due process under the federal constitution; (2) due course of law under the state constitution; (3) the Open Meetings Act; and (4) the Public Information Act. CCID also sought injunctive relief under section 1983 of the United States Code, chapter 42.[1]

The City again filed a plea to the jurisdiction alleging CCID lacked standing to bring its claims, that

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[1]CCID also sought, under the Texas Uniform Declaratory Judgments Act, an order declaring that the City was violating public rights conferred by the state and federal constitutions.

CCID is essentially making another inverse condemnation claim, and that its statutory claims lack merit. After a hearing, the trial court (1) denied CCID's request for injunctive relief and (2) granted the City's plea to the jurisdiction. Because the determination of jurisdiction is our first duty, we will address appellant's points in reverse order.

PLEA TO THE JURISDICTION

In its plea to the jurisdiction, the City alleged it was apparent from the pleadings that CCID lacked standing to sue.[2] For reasons other than those espoused by Candlelight in its plea to the jurisdiction, we find CCID lacks standing to sue.[3]

The doctrine of standing identifies suits appropriate for judicial determination. *Brown v. Todd,* 53 S.W.3d 297, 305 (Tex. 2001). "The general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'" *Tex. Ass'n of Bus. v. Tex. Air*

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[2]The City also argued that – to the extent CCID asserted a takings claim – the district court lacks jurisdiction; CCID's argument it has a due process right to participate in the City's permitting process is "baseless"; CCID has not stated valid open records or meetings claims to confer jurisdiction; CCID sought a declaratory judgment solely to recover attorney's fees; and CCID lacks standing because particularized, individual proof of money damages for any alleged negative impact on property values is necessary.

[3]The City contends CCID lacks standing and cites the test for associational standing. However, the record reveals that CCID received assignments from various property owners in the vicinity of the proposed Rosslyn Road bridge, and it brings this action in its own capacity, based upon those assignments. Because we find CCID lacks standing on grounds not argued by the City, we use the standard of review mandated when appellate courts review standing sua sponte.

Control Bd, 852 S.W.2d 440, 443-44 (Tex. 1993) (quoting *Bd. of Water Engineers v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955)). Unless standing is conferred by statute, a plaintiff must demonstrate that he "possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury." *Williams v. Lara,* 52 S.W.3d 171, 178-79 (Tex. 2001); *see also Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (stating that standing consists of some interest peculiar to person as individual and not as member of general public). It is the plaintiff's burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear the case. *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46. Standing is a question of law subject to de novo review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). As a component of subject matter jurisdiction, standing is never presumed and cannot be waived. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-4. We apply the same standard of review to determine standing as we do to determine subject matter jurisdiction generally. *Id.* at 446. Here, we construe the petition in favor of CCID and review the entire record to determine whether any evidence supports standing. *Id.*

CCID is a Texas non-profit corporation and its president, David Eng, lives on Rosslyn Road. The record contains ten documents assigning to CCID:

> all causes of action which are, or may be, necessary to prevent, or recover compensation for, damage to [the homeowner's property] occasioned by reason of the actual or possible construction of the proposed bridge in the 4400 to 4600 block of Rosslyn Road, and the associated modifications of Rosslyn Road.

The assignments were executed by property owners who live "from directly on the 4400 block of Rosslyn Road, [David Eng] and those neighbors, as well as to the intersection of Bethlehem and Rosslyn and to even flanking streets."[4]

The City argues the trial court has no subject matter jurisdiction because CCID's real claim is an unconstitutional "taking" of property which must be heard in the county civil court at law. CCID strenuously denies this assertion, stating it seeks no damages or compensation for the alleged violation of its members' rights as property owners. Hovvever, CCID's petition speaks in terms of protecting "property interests," the "deprivation of homeowner rights," "irreparable harm to the properties," "affecting the property values of the homes in the vicinity," and preventing "permanent adverse consequences to the property owners." CCID concedes that property owners in the vicinity of the proposed bridge will suffer no compensable injury by its construction. However, CCID claims it was entitled to injunctive relief because (1) property rights will be adversely affected by construction of the bridge, (2) property owners were irreparably harmed by the City's denial of due process, and (3) property owners have no adequate remedy at law.

Rights, constitutional and otherwise, do not exist in a vacuum. *Wilson v. Taylor,* 658 F.2d 1021, 1032 (5th Cir. 1981). The Due Process Clause is only activated when there is some substantial liberty or property interest which is deserving of procedural protections. *Roane v. Callisburg Indep. Sch. Dist.*, 511 F.2d 633, 637 (5th Cir. 1975). By its terms, the Due Process Clause safeguards "life, liberty, or property." *Id.* at 637-38. To have a property interest, a person must have more than an abstract need or desire for

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[4]Taken from the testimony of David Eng at the hearing on CCID's motion for temporary injunction.

it. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Further, he must have more than a unilateral expectation of it. *Id.* He must, instead, have a legitimate claim of entitlement to it. *Id.*

CCID offered evidence that property values on Rosslyn Road will be diminished by construction of the bridge. CCID also offered testimony that property owners will be inconvenienced by the bridge and might have to take a circuitous route in and out of their respective driveways. Finally, CCID offered evidence that the approach to the bridge will be unsafe because the lanes narrow too quickly.

All enhancements, whether public or private, are rarely achieved without some inconvenience. If the public authorities could never build, repair, enhance, or alter a street or highway without consulting all "affected" property owners, permitting them to alter the design of the project, or paying all persons along such thoroughfares for the inconvenience and disruption occasioned by the construction, no public improvements would ever be made. Streets and highways are primarily for the benefit of the traveling public, and only incidentally for the benefit of property owners along its way. *State Highway Comm'n v. Humphreys,* 58 S.W.2d 144, 145 (Tex. Civ. App.–San Antonio 1933, writ ref'd). Thus, a landowner suffers no compensable injury where the government has not physically appropriated, denied access to, or otherwise directly restricted the use of the landowner's property. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 450 (Tex. 1992).

Here, there is no evidence that the bridge will be constructed on the land of any private person; that any property owner will be denied access to his property; or that any property owner will be restricted in the use of his property. It may well be that property owners along Rosslyn Road will suffer a diminution in the value of their property

due to increased traffic, noise, et cetera. However, it is well established that "'The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities.'" *Humphreys*, 58 S.W.2d at 145 (*quoting Heller v. Atchison, T & SF.R. Co.*, 28 Kan. 625 (1882)). Thus, recovery is not permitted if the injury is one suffered by the community in general. *Felts v. Harris County,* 915 S.W.2d 482, 484 (Tex. 1996). Community injuries include highway traffic noise, dust, traffic hazards, and circuitous routes; injuries such as these are not compensable. *Id.* at 485. Periodic street improvements are simply an incident of city life and must be endured. The law gives the adjacent property owner no right to relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made. *L-M-S Inc. v. Blackwell,* 149 Tex. 348, 233 S.W.2d 286, 289 (1950).

CCID concedes that the property owners have no compensable damages, but nevertheless insists that because some ephemeral, non-compensable, previously unrecognized property interest will be "affected" by the construction, state and federal due process protections come into play, and an injunction is necessary.

We are unaware of any cognizable property interest that might be impacted by the City other than an unconstitutional taking of property prohibited by article I, section 17 of the Texas Constitution. CCID has consistently denied that its claim is a takings claim.[5] Therefore, CCID

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[5]We agree with the City's contention that, notwithstanding CCID's elaborate attempt to circumvent the exclusive jurisdiction of the county court, this suit is, in reality, based upon a disguised claim of inverse condemnation. Exclusive jurisdiction in inverse condemnation claims is vested with the Harris County Civil Courts at Law, pursuant

has failed to show any particular injury on which to sue. After fully reviewing the record, and after construing the petition in favor of CCID, we find CCID lacks standing to sue. We overrule CCID's second point of error in part, to the extent it is based on federal and state due process and any related attempt to obtain a declaratory judgment or injunctive relief for want of subject matter jurisdiction. Because a claim (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought, we find CCID lacks standing to bring a claim for injunctive relief. Accordingly, we overrule CCID's second issue on appeal.

OPEN MEETINGS AND PUBLIC INFORMATION ACTS

CCID also petitioned the trial court for relief under the Texas Open Meetings and Public Information Acts. *See* TEX. GOV'T CODE ANN. § 551.002 (Vernon 2004) (requiring every regular, special, or called meeting of a governmental body to be open to the public); TEX. GOV'T CODE ANN. § 552.001 (Vernon 2004)(stating public policy mandates that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."). Each of these statutes confers standing to CCID. *See id.* at § 552.001 (giving "each person" the right to complete information about most governmental affairs); *Burks v. Yarbrough,* 157 S.W.3d 876, 880 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (interpreting the Open Meetings Act broadly to confer standing on any member of the interested public).

In one order, and without stating its reasoning, the trial court granted the City's plea to the jurisdiction and

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to section 25.1032(c) of the Government Code. *Kerr v. Harris County*, 177 S.W.3d 290, 294 (Tex. App.–Houston [1st Dist.] 2005, no pet).

denied CCID's request for injunctive relief.

Whether a plaintiff has alleged facts affirmatively demonstrating a trial court's subject matter jurisdiction is a question of law we review de novo. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We construe the pleadings liberally in favor of the plaintiffs, looking to their intent. *Lacy v. Bassett*, 132 S.W.3d 119, 122 (Tex. App.–Houston [14th Dist.] 2004, no pet.). If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but also do not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be allowed an opportunity to amend. *Id.* A plea to the jurisdiction may be granted without allowing any opportunity to amend if the pleadings affirmatively negate the existence of jurisdiction. *Id.* To prevail, the defense must show that, even if all allegations in plaintiff's pleadings are true, there remains an incurable jurisdictional defect on the face of the pleadings that deprives the trial court of subject matter jurisdiction. *Brenham Hous. Auth. v. Davies,* 158 S.W.3d 53, 56 (Tex. App.–Houston [14th Dist.] 2005, no pet.).

In its plea to the jurisdiction, the City argued that CCID did not make valid open records or open meetings claims to confer jurisdiction. Regarding the open meetings claim, the City argued its permitting process does not involve a "governmental body" as defined by the Act. This argument attacks CCID's right of recovery under the statute and should have more properly been made in a motion for summary judgment; it does not attack the trial court's subject matter jurisdiction. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76-77 (Tex. 2000) (quoting 21 C.J.S. *Courts* § 16 at 23 (1990)) (""The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction

of the court to afford it.'"). Regarding the open records claim, the City argued CCID did not allege it had submitted a written request for information, that it lacks standing because CCID was not a "requestor" as defined by the Act, or that the appropriate remedy is an action for mandamus. The failure to comply in all respects with statutory requirements may defeat a claimant's right to relief but, again, it does not deprive the trial court of subject matter jurisdiction. *Id.* We make no judgment regarding the merits of these claims or their likely success if and when they are presented in a motion for summary judgment. However, it was error to dispose of CCID's Open Meetings Act and Public Information Act claims in a plea to the jurisdiction. Appellant's first issue for review is sustained.

Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings in accordance with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 26, 2006.
Panel consists of Justices Hudson, Fowler, and Seymore.

CAUSE NO. 2005-66589

CONCERNED COMMUNITY
INVOLVED DEVELOPMENT

v.

IN THE DISTRIC COURT OF
HARRIS COUNTY, TEXAS
281st JUDICIAL DISTRICT

CITY OF HOUSTON ET. AL

ORDER ON PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF AND DEFENDANT'S PLEA TO THE JURISDICTION

After an evidentiary hearing on Plaintiff's claim for injunctive relief, and upon considering defendant City of Houston's plea to the jurisdiction, the pleadings of all parties, and the argument of counsel, the court DENIES Plaintiff's claim for injunctive relief. Plaintiff has not shown that it has a probable right to relief or that it can satisfy all of the requ.irements of a probable injury. Moreover, the court GRANTS defendant City of Houston's plea to the jurisdiction.

It is therefore ordered, adjudged, and decreed, that Plaintiff's claim for injunctive relief is DENIED and that defendant City of Houston's Plea to the Jurisdiction is GRANTED. All claims against the City of Houston are dismissed WITH PREJUDICE. Any other relief not expressly granted in this order are hereby denied.

SIGNED this 29th day of November, 2005

/s/ _____
Presiding Judge

...attendance at conventions, or assistance to attendees in locating events. The mayor's office will forward the reports to the chair of the appropriate city council committee or committees for review and recommendations for any changes to this section 40-31 of this Code.
(Ord. No. 05-603, § 5, 5-11-05)

Secs. 40.32–40-40. Reserved.

ARTICLE II. PRIVATE STREET WORK IN GENERAL.*

DIVISION 1. GENERALLY

Sec. 40-41. Scope of article; definitions.

This article shall control and govern the doing within any street or alley in the city of any of the following work or construction: Any paving, or the construction of any curb or gutter (including driveway construction incident to curb or gutter construction). The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) *Director* shall mean the director of the public works and engineering department of the city or his duly designated employees.

(2) *Paving* shall include not only the construction of a

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*Cross references – Erection of detour or barricade signs, 45-18; driving on fresh pavement, § 45-42.

concrete roadway or an asphalt or...

...drawing the entire reference therein to "concrete post street name markers" and there will instead be placed upon such drawing an appropriate endorsement to the effect that a street name sign conforming with the requirements of Council Motion No. 5965, 1956, shall be erected at each street intersection and that specifications for the sign and erection method will be available in the office of the director.

Upon a print of such revised drawing, appropriately identified as such, being delivered to him by the director, the city secretary will insert such revised drawing in such specifications as and to become a part thereof, leaving therein, however, the sheet of such drawing as originally contained therein, writing upon such original sheet an appropriate endorsement over his signature to the effect that it has been superseded by the revised drawing.
(Code 1968, § 41-44; Ord. No. 90-635, § 109, 5-2390)

Sec. 40-44. Stop work orders.

(a) If the director is of the opinion that any work which is being done pursuant to or under color of any permit issued as provided for in this article is not in accordance with the terms of the permit or the plans or specifications therefor, he may direct the person to whom the permit was issued to cease all work on the project until the defaults, errors or omissions specified by him have been remedied. Any person to whom a permit has been issued for the doing of any private street work who, after the director shall have ordered the cessation of work thereupon, shall do any such work or cause or permit any such work to be done (except the remedying of the defects, defaults, or omissions complained of by the director) shall be guilty of an offense. Each day on which any such unauthorized work is

performed in violation of an order to cease the work shall constitute a separate offense.

(b) When satisfied that the defaults, errors or omissions specified by him have been remedied, the director shall in writing authorize the resumption of the work. It shall not, in any prosecution for a violation of this section, be necessary that the complaint negative the issuance of such a resumption order, but the same shall be matter to be shown in defense in any such prosecution.
(Code 1968, § 41-45)

Sec. 40-45. Work beyond scope of permit prohibited.

Any person to whom a permit shall have been issued for the doing of any private street work, as provided for in this article, who shall do or cause to be done any private street work beyond the scope of or not within the permission given by such permit shall be guilty of an offense. Each day on which any such unauthorized work is performed shall constitute a separate offense.
(Code 1968, § 41-46)

Sec. 40-46. Removal ot work done without permit.

(a) If any such work is done in any street or alley in the city of any of the sorts described in section 40-41 of this Code, without a permit therefor having been issued as required by this article, the director shall, upon the same being brought to his notice, direct the person who did the work or caused it to be done to forthwith remove all of such work and restore the street or alley in question to the state and condition in which it was before such unauthorized work was done. Such order may include a specific direction as to the things to be done to accomplish compliance with it, including the removal of any earth or any other material which, without authority therefor, may have been placed in

any street or alley or any part thereof and the replacement of any earth or any other material which may have been removed therefrom or from any part thereof, and it may state the time within which the things therein ordered shall be done. Such order and direction may be in writing or verbal and may be delivered or given either by the director or by any person thereto instructed by him.

(b) If any person to whom an order has been given under this section shall fail, within the time therein stated, to do or cause to be done all of the things therein commanded and ordered, he shall be guilty of an offense. Each calendar day after the expiration of the time provided in such order within which any of the work therein commanded to be done remains undone shan constitute a separate offense.

(c) The offense defined in this section shall be a separate and distinct offense from the offense defined in section 40-55 of this Code of having done the work in the first instance without a permit therefor, and a conviction or an acquittal of a charge of the violation of either of such two offenses shall not constitute a bar to a prosecution for a violation of the other of them.
(Code 1968, § 41-47)

Sec. 40-47. Appeal from orders or decisions of director.

In every case in which any person is aggrieved and dissatisfied at any order, decision or direction made or given by the director under any of the provisions of this article, he shall have the same right of appeal therefrom, and to the same effect and result, as is provided in section 40-65 of this Code for appeals from the refusal of the director to issue a permit as under this article.
(Code 1968, § 41-48)

Sec. 40-48. Responsibility for violations.

(a) If any private street work is done without a permit therefor or is otherwise done in violation of this article by a partnership or any other unincorporated association, every member of the partnership or of the association shall be guilty of the violation. If any such work is so done by a corporation, the president of such corporation, the general manager or the person in active charge of its operations or business, and every director of such corporation shall be guilty of the violation.

(b) If any private street work is done in violation of this article by a contractor for another person, the contractor and the person for which the work is being done shall each be guilty of the offense.

(c) Laborers, mechanics, and other craftsmen having no other connection with the doing of the work regulated by this article than to be employed thereupon at a wage or salary shall not be guilty of offenses for work done in violation of this article. It shall not be necessary, however, for a complaint for a violation oftbis article to negative the fact that the person complained of is such laborer, mechanic or craftsman, but the same shall be matter to be shown in defense in any prosecution thereunder.
(Code 1968, § 41-49)

Secs. 40-49-40.54. Reserved.

DIVISION 2. PERMIT

Sec. 40-55. Required.

It shall be unlawful for any person to do or cause to be done any private street work for which a permit has not been issued by the director. Each day on which any such

work is done without a permit therefor having been so issued shall constitute a separate offense.
(Code 1968, § 41-55)

See. 40-56. Application and accompanying documents generally.

(a) Any person desiring to do or to have done any private street work (except construction of curb and gutter only, with incidental driveway construction, as referred to in section 40-57) shall file with the director an application for a permit therefor, which application shall contain the following information and be accompanied by the following documents:

(1) The name, mailing address, and telephone number of the applicant, together with a statement as to whether the applicant is an individual, a partnership or a corporation, and if a partnership the names of all of the partners.

(2) A general statement of the location of the proposed work and a general statement of the nature and scope of the work proposed to be done.

(3) A statement of whether the work has or has not yet been contracted for, and if a contract has been made the name and address of the contractor and the amount of the contract price; but if the work has not yet been contracted for, then a statement of the applicant's estimate of the probable cost of the proposed work.

(4) A list sufficient to identify the several sheets of the plans and drawings accompanying the application and the several parts or documents constituting the written specifications under which

the work is proposed to be done.

(5) Complete specifications under which the work is proposed to be done, together with plans and drawings therefor, which shall be in sufficient detail to enable an engineer to determine definitely what is supposed to be done, where it is to be done, and how it is to be done. Such drawings must in any event include a complete profile and a plan on which there is shown the width and other dimensions of any paving, curb or gutter proposed to be built and the location thereof with reference to the center line of any street or streets within which the same are to be placed. Such plan must be "tied" to an established city reference monument, or if there is no city reference monument within a reasonable or practicable distance from the proposed work, then the plan must be tied to some other permanent recognized monument on the ground. If the proposed work is in, or is in connection with, a subdivision which is in the process of development and/or approval by the planning commission, the plan must be appropriately tied to the subdivision map. Such plan or other drawings accompanying the application must show the location of all existing or proposed utility lines, sewer lines, or storm sewers. Every sheet of the drawings and each part or document which is a part of any of the written specifications shall be signed under his seal by a professional engineer duly licensed under the professional engineers licensing law of the state. All of the drawings and written specifications accompanying the application shall be deemed to be a part thereof. Where appropriate and desired, any of the drawings or written specifications herein approved as the city's minimum standards under section 40-43 of this Code may, by appropriate

reference thereto, be included in and made a part of the application without the necessity of attaching the same thereto.

(6) Tbe name and address of the professional engineer by whom the drawings and specifications accompanying the application have been prepared, together with a statement as to whether or not the actual performance of the work will be under his supervision.

(7) A statement that if the permit is issued on the application, the proposed work will be done in strict accordance with the plans, drawings and specifications therefor, including amendments and supplements thereto which may be required by the director and agreed to by the applicant before the permit is issued (except for such changes therein as within the general scope, purpose and intent of this article may thereafter be approved in writing by the director).

(8) The date on which it is desired or intended to commence the work and, if any of the work is to be within an existing traveled thoroughfare, the length of time which the applicant proposes to consume in the doing thereof.

(b) Such application, as well as the drawings and specifications accompanying the same, shall be filed in duplicate and both the original and duplicate original of the application itself shall be signed by or on behalf of the applicant and, unless the engineer responsible for the drawings and specifications is himself the applicant, the application shall include a statement signed by him to the effect that the statements therein made as to his connection and intended future connection with the project are true. If

the application shows that the actual performance of the work is to be under such engineer's supervision, and if he shall thereafter cease to be so connected with the project, he shall, within 48 hours after the termination of his connection with it, certify the fact of such tennination to the director.

(c) Tbe applicant may either be the person at whose instance or for whose purpose the work is proposed to be done, or a contractor employed or intending to be employed to do the actual work, or a licensed professional engineer employed to supervise the work. If such licensed professional engineer is himself the applicant. the application shall contain a statement by him that he has been so employed and a statement of the name and address of the person at whose instance or for whose purposes the work is to be done. and he shall sign the application under his official seal.
(Code 1968. § 41-56; Ord. No. 95-104. § 1.1-25-95)

Sec. 40-57. Application when work limited to construction of curbs and gutters.

Any person desiring to do or to have done in the city any private street work consisting of nothing other than the construction of curbs and gutters (including driveway construction incidental thereto), instead of filing tile detailed application with accompanying drawings, which is required under section 40-56 of this Code, may simply file with the director an application for a permit for such work, which application shall be sufficient if it shows who desires to do the work, by whom it is intended to be done, and is sufficient to indicate the scope and extent of the work intended to be done. Such application need not include any plans, drawings or specifications, unless a plan or drawing is necessary to the description of the work proposed to be done, and if the work is to be done by a duly licensed and

bonded sidewalk and curb and gutter contractor, it need not indicate that any licensed professional engineer has any connection with the project. It shall, however, contain an unconditional undertaking that the applicant will observe and comply with any directions or instructions given him by the director incident to the work or the sufficiency of the completion thereof to the end that, if a permit is issued therefor, the director shall have absolute power to require the applicant to do all of those things and none other than those things which the director considers necessary, incident to the work proposed.
(Code 1968, § 41-57)

Sec. 40-58. Style and numbering of application.

Every application for a permit under this division shall be styled "Application for Permit for Private Street Work" and, upon filing, shall be appropriately numbered by the director in such manner that future reference thereto by number and style shall be sufficient to identify it.
(Code 1968, § 41-58)

Sec. 40-59. Applicant's bond -- Generally.

(a) If the permit application under this division is for the doing of work within the portion of an existing street which is actually being used by the public, no permit shall be issued thereupon until there has been filed with the director a bond to secure the city that the proposed work will be done in accordance with the permit, application and plans and specifications, and securing the city against loss. damage, claim, or liability in connection therewith, which bond shall comply with the following requirements of this section as to the terms. conditions and execution thereof.

(b) The bond required by this section shall be in a penal sum equal to the total estimated cost of the

improvements to be constructed (including design and engineering costs) plus an additional ten percent of such amount. No such bond shall be required for work to improve an alley for private access pursuant to section 40-346.

(c) The bond required by this section shall be in favor of and solely and exclusively for the use and benefit of the city.

(d) The bond required by this section shall describe by reference to the number of the application, together with such other brief descriptive matter as is neeessary, the work proposed to be done or to be covered by the permit in connection with which the bond is given.

(e) The bond required by this section shall be conditioned that the work therein referred to will be done and performed in strict and full accordance with the terms and provisions of the application and the permit and in strict accordance with the plans and specifications therefor; and that if any of such work is not done in accordance therewith, or if any materials not in accordance therewith are used in the process of such work, such failure and default will be promptly remedied, and any defective material or work torn out and removed or replaced with material and by workmanship in accordance with the terms of the application, permit and plans and specifications without cost or expense to the city; and that if such is not done within a reasonable time after demand therefor upon the principal by the city, the principal and surety on such bond will (within the penal sum of the bond) be held and firmly bound to the payment to the city of the reasonable cost and expense incurred by the city either in tearing out and removing the defective work entirely and restoring the street to its original state, or in replacing the same with work in accordance with the permit, or in completing and perfecting any work imperfectly or incompletely done; and

shall provide that the certificate of the director to the reasonable necessity for and the cost of any work so done by the city shall be conclusive and binding upon the principal and surety in the absence of clear, convincmg and unmistakable proof that his action in so certifying is fraudulent, arbitrary or capricious.

It shall further be conditioned that the principal and surety indemnify and agree to fully indemnify and save harmless the city and its officers from any and all demand, liability or claim, no matter by whom asserted, arising from or in any manner incident to the doing of any work pursuant to or under color of such permit or the construction of any of the paving or other street work authorized thereby. It shall, however, provide that the liability of the principal and surety shall not include liability to indemnity against causes of action asserted by persons arising from the grade or location of the pavement or other structure built in the street, or from defects or alleged defects therein occurring or existing after the date of the certificate of acceptance of the work hereinafter provided for.

The principal shall further covenant that if the work is not completed within the required number of days after the commencement thereof, the principal, but not the surety, will be liable to the city on account of and for such delay at the rate of $150.00 per day for each day that the completion of the work be delayed beyond the time allowed therefor in the permit.

Such bond shall provide that within the general scope and spirit of the work covered by the permit, the director may without notice to or consent of the surety permit changes in the actual plans and specifications therefor, without in any wise affecting the liability either of the principal or surety.

(f) Such bond shall be upon a form to be prepared and approved by the city legal department and may be executed by the applicant or by the contractor proposing and intending to do the actual work, or if the application is not made by the person at whose instance or for whose purpose the work is proposed to be done, such person may nevertheless execute such bond as principal. It shall be executed also by one corporate surety, which surety shall be a corporation qualified and licensed by the insurance licensing authority of the state under and pursuant to the provisions of articles 4969 to 4972 inclusive, of the Texas Revised Civil Statutes.

(g) If the surety on such bond is a company appearing on the then current list of approved sureties of the United States Treasury Department, the bond need not be accompanied by any proof of the qualification and license as aforesaid of such company, but if such bonding company's name does not appear upon such treasury department's current list there shall be submitted, along with the bond, a certificate from the board of insurance commissioners of the state, bearing date no more than ten days prior to the date of the bond, evidencing the fact that such surety is so qualified and licensed by the state. Such bond shall in any event be accompanied by an appropriate power of attorney evidencing the authority of the issuing agent or attorney to execute the bond for the company.

(h) A bond upon such form so executed shall be accepted on behalf of the city by the director, and his acceptance noted thereupon. If he is in doubt as to the manner or form of the execution thereof, he may submit the same to the city legal department for its approval as to form and execution before he accepts it. Such bond, together with the proof of the authority of the agent to execute the same, and the proof of the surety's qualifications and license if the surety is not on the treasury department's current list, shall

be attached to the city's duplicate original of the permit and become a part of the permanent record in connection therewith.

(i) When the work covered by the permit has, in the opinion of the director, been completed in substantial accordance with the plans and specifications therefor, the director shall, at the request either of the principal or of the surety on such bond, deliver to either or both of them a certificate to such effect. Such certificate shall, in favor of the surety upon such bond, be conclusive proof of the contents thereof, but shall not relieve the principal upon the bond from liability for failure of or defect in the work arising from failure to have fairly and substantially complied in any material respect with the specifications.
(Code 1968, § 41-59; Ord. No. 99-379, §§ 4, 5, 4-21-99)

Sec. 40-60. Same – Cash deposit in lieu of bond.

In any instance in which, by the provisions of section 40-59 of this Code, a bond is required to be given, there may instead be deposited with the director in cash an amount equal to the required penal sum of the bond, which deposit shall secure the city to the same purpose, intent and effect as the bond prescribed by section 40-59 of this Code. When the director is of the opinion that the work has been completed in accordance with the plans and specifications, he shall so certify as provided in section 40-59 of this Code and the deposit referred to shall be returned to the applicant or upon the applicant's order.
(Code 1968, § 41-60)

Sec. 40-61. Same – Bond or cash deposit for curb and gutter work only.

The bond required in connection with any permit for curb and gutter work only, issued as provided in section 40-

64 of this Code, shall be conditioned and executed in accordance with the requirements of section 40-59 of this Code, and shall be in such amount as the director considers necessary to protect the city against having to go in and finish up or undo work begun or done under the permit. Any person to whom such a permit is to be issued may, instead of furnishing such bond, deposit with the director in cash the amount so deemed necessary by the director, to be returned to the applicant after the work has been completed to the satisfaction of the director, or upon surrender of the permit before commencing any work thereunder. If the work is to be done by a duly licensed and bonded sidewalk and curb and gutter contractor, no separate bond shall be required under this division or any cash deposit in lieu thereof.
(Code 1968, § 41-61)

See. 40-62. Fees.

(a) No fee shall be charged upon any permit or application for the construction of any pavement (including curb and gutter construction incident thereto) which includes a reinforced concrete base, the city council here declaring that the advantage and benefit to the city from the construction of that type of pavement is such as to fully warrant the handling by the city, without cost to the person having such work done, the necessary application, investigation, inspection, etc. Upon permits for other paving work or for curb or gutter construction as governed by this article, fees are hereby fixed and established as follows, to be collected by the director before the permit is issued:

(1) For curb and gutter (or either), a permit fee of $0.05 per lineal foot of the curb and gutter (or either) to be constructed but excluding from the computation so much thereof as is within the intersection of any two streets.

(2) For any pavement (except pavement involving a reinforced concrete base) a fee at the rate of $0.10 per rnnning or lineal foot of street to be paved, but excluding from the computation such work as is to be done within the intersection of any two streets.

(3) When the pavement is to be constructed without curb or gutter, the fee charged shall be only the fee of $0.10 per running foot for the pavement as provided above, but where pavement is with curb and gutter, the fee charged shall be $0.10 per running foot of pavement plus $0.05 per lineal foot of curb and gutter.

(b) The minimum fee, where any fee at all is required by the terms of this section, shall be $5.00 upon any one permit.

(c) The fees prescribed by this section are established to cover the expense or a part of the expense to the city incident to the examining of the application, investigation in connection therewith, the inspection of the work as the work progresses.
(Code 1968. § 41-62)

Cross reference – Refund of permit fees paid to department of public works and engineering, § 2-285.

See. 40-63. Issuance or refusal generally.

(a) If the director finds that the plans and specifications for the proposed work for which a permit is sought under this division are sufficient and are in accordance with the purpose, intent and provisions of this article, he shall notify the applicant, and subject to the provisions of this division he shall issue and deliver to the applicant a permit for the work desired to be done in

accordance with the provisions of this article.

(b) If the plans or specifications for work for which a permit is sought under this division are not sufficient or do not contemplate or describe work in accordance with the city's minimum standards or are not adequate to the place and purpose in question, the director shall communicate to the applicant or to the applicant's engineer his objections thereto, permitting and agreeing to such changes in the original drawings and specifications as may be sufficient to meet his objections and after such changes have been agreed to by the applicant and by the applicant's engineer, the director shall, subject to this division, issue the permit.

(c) The director shall not, in any event, issue a permit for the construction of a pavement which includes curb and gutter or curb, unless suitable and sufficient drainage and drainage facilities are already in existence, or the construction thereof is provided for in the plans and specifications for the work covered by the application. Similarly, he shall not issue a permit upon any application which contemplates pavement of a general sort or type (including width thereof, thickness and reinforcing thereof) which, in his opinion is inadequate or unsuitable to the area or place where it is proposed to be placed, notwithstanding that the same, as applied for, is in accordance with the minimum standards approved by this article.

(d) If the plans and specifications (with such changes therein as have been required by the director and approved by the applicant and the applicant's engineer) do not meet the standards and requirements set up by this article, the director shall refuse to issue the permit applied for and shall, upon the duplicate original of the application or a paper attached thereto and suitably identifying the application, certify the fact of his refusal, together with such statement as he sees fit to make of the reasons therefor,

notifying the applicant or the applicant's engineer to such effect and delivering such duplicate of the application with his certificate of rejection to either of them who may request it. At the same time, he shall similarly certify the fact of his refusal upon the other original of the application, which shall...

...licensed by the insurance licensing authority of the state under and pursuant to the provisions of articles 4969 to 4972, inclusive, of the Texas Revised Civil Statutes.

(g) If the surety on such bond is a company appearing on the then current list of approved sureties of the United States Treasury Department, the bond need not be accompanied by any proof of the qualification and license as aforesaid of such company, but if such bonding company's name does not appear upon such treasury department's current list there shall be submitted, along with the bond, a certificate from the board of insurance commissioners of the state, bearing date no more than ten days prior to the date of the bond, evidencing the fact that such surety is so qualified and licensed by the state. Such bond shall in any event be accompanied by an appropriate power of attorney evidencing the authority of the issuing agent or attorney to execute the bond for the company.

(h) A bond upon such form so executed shall be accepted on behalf of the city by the director, and his acceptance noted thereupon. If he is in doubt as to the manner or form of the execution thereof, he may submit the same to the city legal department for its approval as to form and execution before he accepts it. Such bond, together with the proof of the authority of the agent to execute the same, and the proof of the surety's qualifications and license if the surety is not on the treasury department's current list, shall be attached to the city's duplicate original of the permit and become a part of the permanent record in connection

therewith.

(i) When the work covered by the permit has, in the opinion of the director, been completed in substantial accordance with the plans and specifications therefor, the director shall, at the request either of the principal or of the surety on such bond, deliver to either or both of them a certificate to such effect. Such certificate shall, in favor of the surety upon such bond, be conclusive proof of the contents thereof, but shall not relieve the principal upon the bond from liability for failure of or defect in the work arising from failure to have fairly and substantially complied in any material respect with the specifications.
(Code 1968, § 41-59; Ord. No. 99-379, §§ 4, 5, 4-21-99)

Sec. 40-60. Same – Cash deposit in lieu of bond.

In any instance in which, by the provisions of section 40-59 of this Code, a bond is required to be given, there may instead be deposited with the director in cash an amount equal to the required penal sum of the bond, which deposit shall secure the city to the same purpose, intent and effect as the bond prescribed by section 40-59 of this Code. When the director is of the opinion that the work has been completed in accordance with the plans and specifications, he shall so certify as provided in section 40-59 of this Code and the deposit referred to shall be returned to the applicant or upon the applicant's order.
(Code 1968, § 41-60)

Sec. 40-61. Same – Bond or cash deposit for curb and gutter work only.

The bond required in connection with any permit for curb and gutter work only, issued as provided in section 40-64 of this Code, shall be conditioned and executed in accordance with the requirements of section 40-59 of this

Code, and shall be in such amount as the director considers necessary to protect the city against having to go in and finish up or undo work begun or done under the permit. Any person to whom such a permit is to be issued may, instead of furnishing such bond, deposit with the director in cash the amount so deemed necessary by the director, to be returned to the applicant after the work has been completed to the satisfaction of the director, or upon surrender of the permit before commencing any work thereunder. If the work is to be done by a duly licensed and bonded sidewalk and curb and gutter contractor, no separate bond shall be required under this division or any cash deposit in lieu thereof.
(Code 1968, § 41-61)

See. 40-62. Fees.

(a) No fee shall be charged upon any permit or application for the construction of any pavement (including curb and gutter construction incident thereto) which includes a reinforced concrete base, the city council here declaring that the advantage and benefit to the city from the construction of that type of pavement is such as to fully warrant the handling by the city, without cost to the person having such work done, the necessary application, investigation, inspection, etc. Upon permits for other paving work or for curb or gutter construction as governed by this article, fees are hereby fixed and established as follows, to be collected by the director before the permit is issued:

(1) For curb and gutter (or either), a permit fee of five cents ($0.05) per lineal foot of the curb and gutter (or either) to be constructed but excluding from the computation so much thereof as is within the intersection of any two (2) streets.

(2) For any pavement (except pavement involving a

reinforced concrete base) a fee at the rate of ten cents ($0.10) per rnnning or lineal foot of street to be paved, but excluding from the computation such work as is to be done within the intersection of any two (2) streets.

(3) When the pavement is to be constructed without curb or gutter, the fee charged shall be only the fee of ten cents ($0.10) per running foot for the pavement as provided above, but where pavement is with curb and gutter, the fee charged shall be ten cents ($0.10) per running foot of pavement plus five cents ($0.05) per lineal foot of curb and gutter.

(b) The minimum fee, where any fee at all is required by the terms of this section, shall be five dollars ($5.00) upon any one permit.

(c) The fees prescribed by this section are established to cover the expense or a part of the expense to the city incident to the examining of the application, investigation in connection therewith, the inspection of the work as the work progresses.
(Code 1968. § 41-62)

Cross reference – Refund of permit fees paid to department of public works and engineering, § 2-285.

See. 40-63. Issuance or refusal generally.

(a) If the director finds that the plans and specifications for the proposed work for which a permit is sought under this division are sufficient and are in accordance with the purpose, intent and provisions of this article, he shall notify the applicant, and subject to the provisions of this division he shall issue and deliver to the applicant a permit for the work desired to be done in

accordance with the provisions of this article.

(b) If the plans or specifications for work for which a permit is sought under this division are not sufficient or do not contemplate or describe work in accordance with the city's minimum standards or are not adequate to the place and purpose in question, the director shall communicate to the applicant or to the applicant's engineer his objections thereto, permitting and agreeing to such changes in the original drawings and specifications as may be sufficient to meet his objections and after such changes have been agreed to by the applicant and by the applicant's engineer, the director shall, subject to this division, issue the permit.

(c) The director shall not, in any event, issue a permit for the construction of a pavement which includes curb and gutter or curb, unless suitable and sufficient drainage and drainage facilities are already in existence, or the construction thereof is provided for in the plans and specifications for the work covered by the application. Similarly, he shall not issue a permit upon any application which contemplates pavement of a general sort or type (including width thereof, thickness and reinforcing thereof) which, in his opinion is inadequate or unsuitable to the area or place where it is proposed to be placed, notwithstanding that the same, as applied for, is in accordance with the minimum standards approved by this article.

(d) If the plans and specifications (with such changes therein as have been required by the director and approved by the applicant and the applicant's engineer) do not meet the standards and requirements set up by this article, the director shall refuse to issue the permit applied for and shall, upon the duplicate original of the application or a paper attached thereto and suitably identifying the application, certify the fact of his refusal, together with such statement as he sees fit to make of the reasons therefor,

notifying the applicant or the applicant's engineer to such effect and delivering such duplicate of the application with his certificate of rejection to either of them who may request it. At the same time, he shall similarly certify the fact of his refusal upon the other original of the application, which shall remain as a permanent file and record in his office.
(Code 1968, § 41-63)

Sec. 40-64. Issuance for curb and gutter work.

Upon an application under section 40-57 of this Code for curb and gutter work, the director shall make such investigation and inquiry as he deems necessary, and if it appears to him that the work referred to may be done without damage or injury to the street or to the rights of any other abutting property owners or of any other person who may have any interest or right related thereto, he shall grant a permit therefor. The procedure in the matter of actual issuance of such permit, retention of the identical duplicate thereof and numbering and identification thereof shall be the same (except as herein expressly provided otherwise) as that provided in this division for other permits.
(Code 1968, § 41-64)

Sec. 40-65. Appeal from refusal.

(a) If the director refuses to issue a permit applied for under any provision of this division, the applicant may, within 30 days after such refusal is communicated to him, appeal therefrom to the city council without other formality than filing with the city secretary a letter in duplicate signed by the applicant sufficient to show the fact of the refusal of his application, the reason (if any) stated therefor by the director, and the applicant's desire to appeal from such refusal to the city council. The city council shall thereafter, upon such investigation and the hearing and

considering of such evidence as it deems proper, either sustain or overrule the director's action, by motion, resolution or ordinance. If the council overrules the director, he shall thereupon issue the permit, noting thereon and on the city's duplicate original thereof, the fact that it is issued pursuant to council's action in overruling his refusal to grant it in the first instance.

(b) The action and decision of council shall be final; provided, the city council shall not order the issuance of a permit for any street work providing for the doing of work of a sort which is not adequate and suitable for the place to which and the purpose for which it is proposed to be done, taking into consideration the public welfare and safety, and the nature and density of traffic which may be expected to use the street in question.
(Code 1968, § 41-65)

Sec. 40-66. Contents.

A permit issued under this division shall state that the applicant (or the applicant's engineer) must notify the director when the work is commenced. If the application includes any work to be done within an existing traveled thoroughfare and is of a sort which, in the director's opinion, will interfere with or inconvenience the public while the work is in progress, then the permit shall state that the work must be completed within the length of time, after the commencement thereof, stated by the applicant as required by paragraph (8), subsection (a), of section 40-56 of this Code.
(Code 1968, § 41-66)

Sec. 40-87. Permit for work in subdivision in advance of plat approval.

Any person intending to subdivide or develop as a

subdivision any unplatted area within the city, in advance of submitting his proposed plat to the planning commission may, if he desires to do any of his street development work, make an application to the director containing those essentials which are stated in section 40-56 of this Code, and the director may, upon his approval of the proposed work and the payment of the fees required by this division, issue a permit therefor in all respects the same as if the work were to be done on a street as defined in section 40-41 of this Code, but the issuance of such permit shall not constitute an approval of any proposed plan or plat of the addition, and shall in no manner interfere with the right of the planning commission to withhold its approval thereof or to require changes therein before the same is approved.

If any person shall do any such work in any such area without first having obtained the permit herein provided for, the planning commission shall not thereafter approve the plan of such subdivision until there is furnished to it a certificate by the director that all of the street work in such subdivision is in accordance with standards which are at least equal to the minimum standards provided in this article and are of a sort which the director would have issued a permit if one had been applied for.
(Code 1968, § 41-67; Ord. No. 95-104, § 1, 1-25-95)

Sec. 40-68. Effect of acceptance.

(a) Any person to whom a permit is issued pursuant to any of the provisions of this division will, by his acceptance of such permit (which acceptance shall be conclusively presumed if, after the permit is issued, he does any of the work contemplated or provided for in the application), undertake or promise that the work covered by the permit and application will be done in full and exact accordance with the provisions of the application and of the plans and specifications, if any, therefor, and that no other

work than that covered by the permit will be undertaken pursuant thereto. He will further thereby agree that, during the course of the work, every instruction and order of the director, or of any inspector or other city employee delegated thereto by the director, for stopping any work which is being done in a manner contrary to the plans and specifications or the application, correcting and replacing any work not in compliance therewith or completing any work necessary to accomplish compliance therewith, will be promptly and immediately observed.

(b) Without limiting the obligation of the applicant to faithfully adhere to the plans, drawings and all of the specifications, he will, by the acceptance of a permit, particularly undertake that no materials will be used in the work except those which, under the appropriate provisions of the city's minimum standard of specifications, have been tested and approved by an approved testing laboratory as therein provided; and that if any materials not so tested and approved are used, he will, upon such violation being discovered by him or brought to his notice, promptly remove and tear out the work in which such untested or unapproved materials were used and replace the same by work of proper, tested and approved materials.
(Code 1968, § 41-68)

Cross reference – Subdivisions, Ch. 42.

Sec. 40-69. Issuance does not impose liability on director or city.

By virtue of the issuance of any permit required by this division neither the director nor the city shall be or become liable or responsible in any way either to the applicant, the contractor, if any, for the work, or to any other person for the sufficiency, correctness or suitability of the plans or specifications or the project itself, and the work

done pursuant to such permit shall be the private venture, work and responsibility of those interested in it, and the city shall not be liable directly or indirectly to any laborer or workman employed thereupon or to the furnisher of any materials for use therein, or to any person having a cause of action arising directly or indirectly from the doing or prosecution of the work or the construction of the pavement or other facilities accomplished thereby.
(Code 1968, § 41-69)

Sec. 40-70. Issuance does not constitute approval of subdivision or acceptance of streets and alleys therein.

If a permit issued under this division is for work in a subdivision not yet approved by the planning commission. the issuance of the permit shall not constitute an approval of the subdivision or an acceptance of streets or alleys shown on the subdivision map, and neither the city nor the planning commission shall be in any way estopped by virtue of the issuance of such pennit.
(Code 1968. § 41-70)

Sec. 40-71. Records to be kept.

If the director issues a permit under this division. including the issuance of a permit pursuant to council action as provided in section 40-65 of this Code, he shall attach to the city's original of the application the bond, if required under this division, filed with and approved by him, together with an exact copy of the permit, signed by him, and such duplicate of the permit, such bond and the entire application therefor shall be and continue a permanent file and record in his office.
(Code 1968, § 41-71)

Secs. 40-72-40-81. Reserved.

[PLAINTIFF'S EXHIBIT 4]

From:	"Sakolosky, John - PWE" <John.Sakolosky@cityofhouston.net>
To:	'"Jack McReynolds"' <barja_inc@yahoo.com>
Cc:	"Nelson, Paul R. - PWE" <Paul.Nelson @cityofhouston.net>; "Bulloch, Kathlie - PWE" <Kathlie.Bulloch @cityofhouston.net>; "Schatz, Gary - PWE" <Gary.Schatz@cityofhouston.net>; "Howard, Mike - CNL" <Mike.Howard @cityofhouston.net>
Sent:	Friday, February 18, 2005 11:25 AM
Subject:	RE: No Bridge on Rosslyn meeting

Mr. McReynolds;
We will have to postpone and reschedule our meeting. We appreciate your understanding. The consultant submitted revised drawings yesterday (Thursday, 2/17) and we will be reviewing them next week. I appreciate the neighborhoods concern regarding legal costs. Have you considered meeting with the developer to discuss the neighborhood's primary concerns, and to try and resolve the concerns in a manner acceptable to both parties. As concluded at last weeks meeting, the City does have a duty to review and approve the drawings if they comply with the City's design standards.

Jack Sakolosky, P.E.
City Engineer - PWE
713/837-7114

–Original Message–

From: Jack McReynolds
[mailto: barja_inc@yahoo.com]
Sent: Friday, February 18, 2005 10:00 AM
To: Nelson, Paul R. - PWE; Sakolosky, John -PWE
Cc: Bulloch, Kathlie - PWE; Schatz, Gary - PWE; Howard, Mike - CNL; Toni Lawrence; Toni Lawrence; David Eng
Subject: RE: No Bridge on Rosslyn meeting

If it was easy it wouldn't be no fun! Understand your problem. Your list of folks involved...public agencies, etal...leaves us out. We who live there are very much in the picture, and we have yet to see a set of plans. Please keep in mind that from our end the City has previously approved plans that were proved to be faulty. This cost our neighborhood several thousand dollars in legal costs. We can pospone the meeting but do need access to plans that enter our lives. How can we access these plans? Any positive thoughts here will be appreciated as we are trying to work with the City and avoid more legal bills. I will hold time open but need a call if meeting is to proceed. Can't tell you now if others from the neighborhood can hold this open. It's probably best to pospone until we resolve this plans question. Feedback please.

"Nelson, Paul R. - PWE" <Paul.Nelson @cityofHouston.net> wrote:

Jack, et al. I apologize, but it occurred to me that I had told the council member that we would be able to provide plan and profile construction drawings of this bridge, or any other such project, when and if the plans are approved and signed by the city engineer. It is my understanding that until that time, plans, studies, etc. are considered drafts and as such are not of "public" record. I do not believe we

should meet and review any drawings until they are approved by the city engineer. As stated in our meeting, we have sought or will seek input from all affected public agencies and city departments and will approve the drawings when all such comments are received and the plans meet the city's design standards. Until that time, I am not comfortable in meeting to review these plans and don't feel that meeting would be beneficial. We can leave the meetling time in place in case such approval is forthcoming. I have copied Melba Porteau in the legal Department should she have any input with regard to my decision PRN

-Original Message-
From: Sakolosky, John - PWE
Sent: Thursday, February 17, 2005 9:55 AM
To: 'Jack McReynolds'
Cc: Bulloch, Kathlie - PWE; Schatz, Gary - PWE; Nelson, Paul R. - PWE; Howard, Mike - CNL
Subject: RE: No Bridge on Rosslyn meeting

Mr. McReynolds;
We will meet you at the site. We will have a copy of the construction drawings to review with you.

Jack Sakolosky, P.E.
City Engineer
713/837-7114

-Original Message-
From: Jack McReynolds
[mailto: barja_inc@yahoo.com]
Sent: Thursday, February 17, 2005 9:46 AM
To: john.sakolosky@cityofhouston.net

Cc: Toni Lawrence; Toni Lawrence
Subject: No Bridge on Rosslyn meeting

Jack, your office called to confirm our visit. As I understand it we will meet at the proposed bridge site monday, Feb. 21st at 4:00 in the afternoon. Please bring a copy of the proposed plans for us to review. If we can't keep what you bring let me know how we can obtain our own copy for our engineer to review.

See you monday. If you need to contact me prior to that time I can be reached at 713-957-8112 (office). or 713-681-3335 (home).

Sincerely.
Jack McReynolds

No. 07-96

FILED
AUG 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CONCERNED COMMUNITY
INVOLVED DEVELOPMENT, INC.,

Petitioner,

v.

CITY OF HOUSTON, TEXAS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

BRIEF FOR RESPONDENTS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

ALVIN L. FREEMAN
Counsel of Record
9800 Richmond Ave., Suite 520
Houston, TX 77042
713-266-2560 – Telephone
713-266-2568 – Facsimile

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner lacks standing to bring the Petition for Writ of Certiorari because Petitioner's cause of action is moot since Petitioner seeks to enjoin an event which has occurred.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals is reported at 209 S.W. 3d 666.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 26, 2006. A Petition for Review was denied by the Supreme Court of Texas on April 27, 2007. The Petition for Writ of Certiorari was filed on July 25, 2007. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

The Statement is modified by the following additional facts:

(1) Subsequent to the denial of temporary injunction by the trial court, Respondents constructed the bridge within the public right-of-way for Rosslyn Road in Houston, Harris County, Texas. The date of final completion of the work performed was established as July 26, 2006. On July 28, 2006, the City of Houston Department of Public Works and Engineering accepted the work as complete and accepted responsibility for security, maintenance, heating, ventilating, air conditioning, utilities, damage to the work and insurance, that has not been previously transferred from Contractor.

(2) The Affidavit of Alvin L. Freeman with attached Certificate of Final Completion regarding completion of the bridge are attached hereto.

ARGUMENT

The only relief which Petitioner sought against Respondents herein was a temporary and permanent injunction enjoining construction of a bridge across a drainage ditch along Rosslyn Road in Harris County, Texas. The trial court denied Petitioner's Application for Temporary Injunction and the appellate court affirmed the judgment of the trial court on this issue.

The Texas courts have, on numerous occasions, held that a court may not enjoin the performance of an act or a deed which is already accomplished. *Isbell v. Rednick,* 193 S.W. 2d 736, 737 (Tex. Civ. App., Waco, 1946, no writ); *Cooper v. Milam,* 256 S.W. 2d 196, 200, 201 (Tex. Civ. App., Waco, 1953, no writ); *Corpus Christi Developers, Inc. v. Chiles,* 275 S.W. 2d 700, 701 (Tex. Civ. App., San Antonio, 1955, no writ); *Green v. Gregg,* 520 S.W. 2d 924, 926, 927 (Tex. Civ. App., Tyler [12th Dist.], 1975, no writ). The court in *Continental Pipeline Company v. Gandy,* 142 S.W. 2d 631 (Tex. Civ. App., San Antonio, 1940, no writ) stated. "The preliminary question, however, of whether appellant shall or shall not construct its telephone line and put it in operation is no longer a live subject of controversy, since those acts have been actually consummated, and are existing facts and this court may not now, in this proceeding for temporary injunction, say whether those acts were wrongfully committed." The court, in the case of *Roadrunner Investments, Inc. v. Texas Utilities Fuel Company,* 526

S.W. 2d 615, 616, 617 (Tex. Civ. App., Fort Worth [2nd Dist.], 1975, no writ) states on page 617:

> Roadrunner's reason for seeking to enjoin the condemnation proceeding was to prevent it from reaching the stage to where TUFCO, by means of that suit, could get possession of Roadrunner's land and build its pipeline thereon. A temporary injunction enjoining TUFCO from further proceeding with the condemnation case prior to a hearing on the merits of this case could no longer have any practical legal effect on the matter, because the pipeline is now already in existence. The question of whether or not the pipeline was wrongfully built on Roadrunner's land could not be determined at a hearing of an application for the temporary injunction.

The case of *Cooper v. Milam, supra,* involved the issue of whether the Citizens National Bank should be prohibited from voting certain stock in favor of a partial capital liquidating dividend and prohibiting the company and its president from counting such vote or paying the dividend so voted. The court, in that case, at page 201, stated: "Preventive injunctions necessarily operate only upon unperformed and unexecuted acts. It is axiomatic that a prohibitory injunction against the performance of an act or a deed which has already been accomplished is futile and useless." The court further stated at page 200:

> Although we are inclined to the view that the record before us fails to disclose an abuse of discretion on the part of the trial judge in refusing to grant appellant's application for a temporary injunction, we do not think it is necessary or proper for this court to pass upon that question or to determine at this time whether appellant or the

> Bank had the right or duty to vote the Barrett Stock on December 3, 1952, or to decide whether the trial court did or did not err in refusing to grant the application because it now appears that the acts which appellant sought to enjoin have been performed and hence we have concluded that Petitioner's application for a temporary injunction has become moot.

The Fifth Circuit Court of Appeals, in the case of *Bayou Liberty Association, Inc. v. United States Army Corps of Engineers and Wal-Mart Stores, Inc.; Home Depot USA, Inc., Intervenors*, 217 F.3d 393 (5th Cir. 2000), at page 396, states: "We have consistently found that a request for injunctive relief is moot when the event sought to be enjoined has occurred. Id. (citations omitted). When a party seeks an injunction to halt a construction project the case may become moot when a substantial portion of that project is completed. . . ."

In the case of *Harris v. City of Houston*, 151 F.3d 186 at page 189, the court states: "As an initial matter, we find it beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined . . . " Once the action that the plaintiff sought to have enjoined has occurred, the case is mooted because 'no order of this court could affect the parties' rights with respect to the injunction we are called upon to review' . . . "At page 191, the court states: "When a civil case becomes moot pending appellate adjudication, the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss."

When facts have occurred pending an appeal of a case that are not shown by the record that have rendered the

appeal moot, such facts can be proved to the appellate court by means of affidavits. *Roadrunner Investments, Inc. v. Texas Utilities Fuel Company, supra*, at page 616; *Hopkins v. City of Dallas,* 106 S.W. 2d 783, 784 (Tex. Civ. App., Fort Worth, 1937, writ ref'd.).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

DATED August 16, 2007.

Respectfully submitted,

ALVIN L. FREEMAN
Counsel of Record
9800 Richmond Ave., Suite 520
Houston, TX 77042
713-266-2560 – Telephone
713-266-2568 – Facsimile

NO. 07-96

IN THE SUPREME COURT OF THE UNITED STATES

CONCERNED COMMUNITY
INVOLVED DEVELOPMENT, INC.,
Petitioner,

v.

CITY OF HOUSTON, TEXAS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, AND LAZER CONSTRUCTION COMPANY, INC.,
Respondents

AFFIDAVIT

THE STATE OF TEXAS §
§ KNOW ALL MEN BY
COUNTY OF HARRIS § THESE PRESENTS:

BEFORE ME, the undersigned Notary Public, on this day personally appeared ALVIN L. FREEMAN who, after having first been duly sworn, upon his oath did depose and say:

1. My name is ALVIN L. FREEMAN. I have never been convicted of a felony or a crime involving moral turpitude and I am competent to execute this Affidavit, which is based upon my personal knowledge.

2. I am the Administrative Manager of Candlelight Development Joint Venture. I have personally participated in development of Candlelight Place Section 3, a subdivision along Rosslyn Road in Harris County, Texas. A portion of the development of the subdivision included paving and drainage facilities and construction of a bridge to serve Rosslyn Road. The bridge was constructed across a Harris County drainage ditch granting access to Candlelight

Place Section 3 across Rosslyn Road. The plans for construction of the paving and drainage facilities (including the bridge) were approved by the City of Houston Public Works and Engineering Department and were assigned Drawing No. 40080.

3. Construction of the bridge was completed in the Summer of 2006. The date of final completion of the work was established by the City of Houston as July 26, 2006.

4. Attached hereto is a Certificate of Final Completion, executed by the Chief Inspector of the City of Houston and the Houston City Engineer certifying final completion of paving and drainage facilities serving the Subdivision. Included among the drawing numbers certified as having been finally completed is Drawing No. 40080.

5. FURTHER AFFIANT SAITH NOT.

/s/ Alvin L. Freeman
ALVIN L. FREEMAN

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

This instrument was acknowledged before me on this the 14th day of August, 2007, by ALVIN L. FREEMAN.

/s/ Tina A. Hayden
NOTARY PUBLIC,
STATE OF TEXAS

[SEAL] TINA A. HAYDEN
MY COMMISSION EXPIRES
August 26, 2009

CITY OF HOUSTON
STANDARD DPC DOCUMENT

CERTIFICATE OF FINAL COMPLETION

Document 00650

CERTIFICATE OF FINAL COMPLETION

PROJECT: Candlight Place See 3

CONTRACT No.: ___ PROJECT No.: Paving 609455 DWG 37775
Water C16231 DWG 40080
Storm 607970
Key Map 452-E
Sanitary 613005

TO: Lazer Construction Co
Contractor and
Address for Written Notice 3405 Almeda Genova Road
Hou. Tx 77047

1.01 DATE OF FINAL COMPLETION

The Work performed under the Contract was inspected on 6-27-06 and found to be complete. The date of final completion of the Work is hereby established as 7-26-06.

1.02 PUNCH LIST

Contractor certified in Document 00641 – Contractor's Certification of Final Completion that all Punch List items were completed or corrected. Failure to identify incomplete work items or requirements of the Contract prior to issuance of this Certificate does not alter the responsibility of Contractor to comply with all provisions of the Contract.

1.03 ACCEPTANCE OF THE WORK

Based on inspection and to the best of our knowledge, information and belief, the Work has been

completed in accordance with the terms and conditions of the Contract and we recommend acceptance of the Work by City Council or their delegated authority.

Tom Shepherd	/s/	Tom Shepherd	7/26/06
Developer/Contractor		Signature	Date
Shailesh Patel	/s/	Shailesh Patel	7/26/06
Chief Inspector, City of Houston		Signature	Date
for John J. Sakolosky, P.E.	/s/	Rajiv Arya	7/28/06
City Engineer		Signature	Date

1.04 TRANSITION OF RESPONSIBILITIES

Except as provided in the Contracting documents attached hereto, Department of Public Works & Engineering accepts the Work as complete and accepts responsibility for security, maintenance, heating, ventilating, air conditioning, utilities, damage to the Work, and insurance, that has not been previously transferred from Contractor.

for John J. Sakolosky, P.E.	/s/	Rajiv Arya	7/28/06
For Public Utilities and R-O-W Fleet Management		Signature	Date

cc: [*Design Consultant*], Jeff Taylor Erin Dargan, File]

FILED
AUG 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-96

In the Supreme Court of the United States

CONCERNED COMMUNITY INVOLVED DEVELOPMENT, INC.,
Petitioner,

v.

CITY OF HOUSTON, TEXAS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, and LAZER CONSTRUCTION COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of Texas

PETITIONER'S REPLY BRIEF

DAVID MELASKY
Counsel of Record
2777 ALLEN PARKWAY,
SUITE 1000
HOUSTON, TEXAS 77019
713-965-9984-TELEPHONE
713-526-2708-FACSIMILE
Counsel for Petitioner

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

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PETITIONER'S REPLY BRIEF

The case at bar involves a challenge to the unconstitutional procedures employed by the City of Houston in issuing permits to developers authorizing the private design and construction of bridges and road modifications without allowing any form of participation by adjacent property owners who will be impacted by the proposed facilities. The City Ordinance specifying this permitting process has remained unchanged throughout the pendency of this suit. The controversy presented to this court is whether this permit issued by the City is constitutionally infirm due to the violations of the procedural due process rights of adjacent homeowners. Since this procedure continues to remain in effect, the adjacent property owners could be further impacted by future permits issued to Respondent Candlelight Development Joint Venture or a successor in interest to Candlelight using the same constitutionally flawed procedure. Moreover, the language of the ordinance would require removal of the disputed facilities if the permit were adjudicated to be invalid. Accordingly, the questions presented to this court regarding Respondent's assertions of mootness are:

1. Can a Fourteenth Amendment procedural due process challenge to the issuance a permit be moot if the unconstitutional procedure remains in effect and the adjacent property owners are subject to a continuing potential to be subjected to the denial of procedural due process in the granting of future permits which affect their homes?

2. Is a procedural due process challenge to a permit moot based on the assertion that the permitted facilities have been built if the permitting regulations themselves would require removal of the unpermitted construction should the

permit be declared void?

The case falls within "capable of repetition yet evading review" exception to mootness.

This court has long recognized that cases, such as the case, *sub judice*, are within an exception to mootness where:

> "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and
> (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Federal Election Commission v. Wisconsin Right to Life Inc.*, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ____, No. 06-969 (2007), quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)

In the recent case of *Federal Election Commission v. Wisconsin Right to Life, supra,* this court addressed a claim of mootness based on the FEC's assertion that the disputed political ads were related to an election which had already occurred and thus the controversy had been mooted. In rejecting this claim, this Court noted that the party seeking relief could not predict future disputes in sufficient time to litigate the issue prior to the the disputed statutory blackout period for political ads and thus the "too short to be fully litigated" requirement was met. In addition, this Court found that the "capable of repetition" requirement of a reasonable expectation that the complaining party would be subject to the alleged illegal conduct was satisfied by the expressed intention of the complaining party to run the disputed political ads in future and that there was no reason to believe that the FEC would refrain from future prosecutions based on the disputed ads.

In the oft cited case of *Nebraska Press Assn. Et Al v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), this Court rejected a claim of mootness based on the expiration of an order restricting pre-trial publicity where the orders had terminated by its own terms upon the empaneling of the jury in the underlying criminal case. Applying the "capable of repetition, yet evading review" doctrine, the Court noted that because of the possibility of a new trial in the event of an appellate reversal of the criminal case giving rise to the controversy and because the Nebraska Supreme decision would allow future court orders such as the order being disputed in the case then before the Court, the controversy would likely reoccur between the complaining media parties and the state and the brief duration of the disputed pre-trial orders would thus evade review if the controversy was considered moot. Similarly in *Gannett Co. v. Depasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) this court applied *Nebraska Press Assn. supra*, finding again that a controversy over pre-trial order is not mooted by the expiration of the order where review can not be completed prior to the termination of orders of such short duration and the controversy is likely to reoccur. Likewise, in *Edgar v. Mite Corp. Et Al, 457 U.S. 624,* 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982), the Court held that a challenge to the constitutionality of a state anti-takeover statute was not mooted by an U.S. District Court's injunction against enforcement of the statute since the state officer charged with enforcement intended to proceed with the enforcement of the statute if the judgment of the trial court were to be reversed. The "capable of repetition, yet evading review" was held to defeat an assertion of mootness in *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988), where a disabled student claiming statutory educational benefits was determined to be entitled to have his appeal heard by this Court even though not currently faced with the denial of such benefits since the denial of benefits the disabled petitioner complained

of was likely to reoccur due to which the nature of the petitioner's disability (aggressive conduct) which would likely create the same misconduct issues giving rise to the issues presented in the appeal before the Court. See also *City of Erie v. Pap's AM*, 529 U.S. 277, 120 S. Ct. 1382, 146 L.Ed.2d 265 (2000) (owner who closed business and sold the property involved in challenge to obscenity ordinance did not render case moot since owner could re-open a similar business elsewhere.)

This case at bar falls squarely within the "capable of repetition yet evading review "doctrine enumerated by the Court in cases cited above. The City ordinance under which the disputed permitting procedures are employed remains unchanged and in effect. The homeowners whose property has been impacted by the issuance of the permit contested in this appeal are thus subject to future city permit issuances without procedural due process which could again affect their property. Moreover, the opinion of the Texas Court of Appeals in this cause deprives all property owners of any procedural due process rights except when a compensable taking is alleged. Since no provision is made by the City for participation by affected property owners in permitting under Article II of Chapter 4O of the City of Houston Ordinances, there is no chance for review prior to permit issuance (and the construction authorized by such permits which can begin immediately upon permit issuance).

Finally, the issue before the court in the case at bar is whether a permit issued by the City of Houston is void since the procedures employed by the City in approving the permit violated procedural due process as to the owners of nearby homes. If the permit is declared void for unconstitutionality, then according to City Ordinances, the unpermitted work must be removed from the roadway. (See City of Houston Ord. Sec.

40-46 in App. 3 to Petition for Review). Thus relief can still be granted by this court and this case is not moot.

The constitutional validity of the City's action is not determined by whether the bridge and roadway modifications authorized by the disputed permit has been constructed or not. The issue of whether the homeowners who live adjacent to the bridge and its approaches were entitled to procedural due process in the permit approval process is a continuing issue whether or not a bridge is physically present.

CONCLUSION

The property owners affected by the disputed permit have been denied their procedural due process rights to participate in the process of permit issuance before the City of Houston grants a permit to a private entity which will impact their property. This permit procedure remains in effect and can affect these homeowners again without adequate time for review. Accordingly, Respondent's claim of mootness is without merit.

Respectfully submitted,

DAVID MELASKY
Counsel of Record
2777 ALLEN PARKWAY, SUITE 1000
HOUSTON, TEXAS 77019
Tel: (713) 965-9984
Fax: (713) 526-2708